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No. 92-90

In the Supreme Court of the United States

OCTOBER TERM, 1992

VIRTUAL MAINTENANCE, INC.,
PETITIONER,

v.

PRIME COMPUTER, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

This case was tried and appealed on the basis of three antitrust claims — all of which were rejected by the court of appeals on grounds that were not at issue in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). Petitioner nevertheless attempts to recast its case and, relying on isolated language in the court of appeals' opinion, secure a remand for reconsideration in light of *Kodak*. The petition lacks merit and should be denied.

1. *Factual Background.* Respondent Prime Computer, Inc. ("Prime") manufactures, sells, and services computer systems. Pet. App. 2a-3a.[1] Among its products is the "50 Series"

[1] Subsequent to the filing of the petition, Prime changed its name to Computervision Corporation ("Computervision"). Computervision has one nonwholly owned subsidiary, Nihon Prime Computer, Inc., a Japanese corporation partially owned by Toshiba Corporation. *See* Rule 29.1.

minicomputer (*id.* at 3a), which can be used with more than 100 different software programs to perform a wide variety of tasks, including computer-aided design and manufacturing ("CAD/CAM"). Pet. 2, 7. One such CAD/CAM program is called PDGS, which at the relevant time was available commercially only for 50 Series computers. *Id.* at 5. PDGS was developed, is owned, and is periodically revised by Ford Motor Company ("Ford"). Pet. App. 3a. Ford requires that PDGS be used by companies wishing to provide design services to Ford. *Id.* at 3a. Since 1983, Ford has granted Prime a year-to-year license to distribute PDGS. *Ibid.* That software is used on approximately 350-400 of the 23,000 Prime 50 Series computers in existence and accounts for 3% of the total CAD/CAM market worldwide (which was the geographic market stipulated by the parties, *see id.* at 8a). *Id.* at 3a-4a.[2]

Prime also sells a PDGS software maintenance contract, which includes telephone advice and on-site service, as well as any PDGS revisions that Ford releases during the contract period. C.A. App. 588-89. Prime enters software maintenance contracts only with customers who allow Prime to perform the hardware maintenance service on their 50 Series computers. *Id.* at 603. Prime charges the same monthly hardware maintenance fees to all 50 Series customers, including those using PDGS. *Id.* at 1400, 1421, 1825-26.

Petitioner Virtual Maintenance, Inc. ("Virtual") provides hardware maintenance service for various types of computer systems. Pet. App. 4a. In this suit, it claimed that Prime's PDGS maintenance contract illegally tied Prime 50 Series hardware service (the "tied" product) to PDGS software maintenance (the "tying" product), thereby foreclosing Virtual from servicing Prime 50 Series hardware. *Id.* at 5a. Virtual

[2] Prime also makes and distributes its own CAD/CAM product known as CADDS, which does not run on the 50 Series computer and is not a subject of this suit. C.A. App. 443-44. The 11% general CAD/CAM market share attributed to Prime in the petition and the opinion below includes CADDS in addition to the 3% share accounted for by PDGS. Pet. App. 3a.

argued that this tie was *per se* illegal because Prime possessed market power in two alternative tying product markets: (1) "the sale of software revisions and support for the CAD/CAM industry in general"; and (2) "the sale of software revisions and support for software necessary to do business with Ford Motor Company." *Id.* at 12a. As a third basis for antitrust liability, Virtual argued that this tying arrangement was illegal under the rule of reason. Pet. 10.

2. *Proceedings Below.* The district court submitted all three of Virtual's antitrust theories to the jury, which returned a general verdict for Virtual. The court of appeals reversed, concluding that each liability theory was defective. The court began by rejecting Virtual's contention that it "need not determine the relevant product market because Prime's market power is established by evidence that Prime was able to force an appreciable number of customers to submit to the tie [between the PDGS maintenance contract and the hardware maintenance requirement]." Pet. App. 8a. Relying on *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984), the Sixth Circuit concluded that Virtual had to show not only that some customers were forced to accept the tie, but also that Prime was able to effect that requirement *"because of its market power* over the tying product." *Id.* at 9a-10a (emphasis in original). The court then turned to the two alternative tying product markets proposed by Virtual to assess whether Prime had the requisite market power.

First, the court addressed Virtual's primary contention (all but abandoned in this Court) that Prime had market power in "the market for revisions and support for the CAD/CAM industry in general." Pet. App. 12a. Noting that Prime had "at most an 11% share [of that market]" — 3% based on PDGS and 8% based on other Prime CAD/CAM products *(see* note 2 *supra.)* — the court found that this market share was "insufficient to confer market power." *Id.* at 12a (citing *Jefferson Parish*, 466 U.S. at 26 [30% market share insufficient]; and several lower court cases). The court further

observed that this market share figure actually overstated Prime's market power because "Prime can only control customers who desire PDGS software and PDGS accounts for less than 3% of the general CAD/CAM market." *Id.* at 13a.

The Sixth Circuit next addressed Virtual's secondary claim (the one now featured in the petition) that Prime had market power in the market for "revisions and support for software necessary to do business with Ford Motor Company." Pet. App. 12a. The court agreed with the proposition that this tying product market definition "must fail because [it] is limited to PDGS," which the court observed was "a single manufacturer's brand of software." *Id.* at 14a. The court noted cases which "reject[ed] market definitions limited to a single manufacturer's products" (*id.* at 14a-15a), but did not rest its rejection of Virtual's claim on that ground. Rather, it first *accepted Virtual's* position that "[d]efining the market by Ford's requirement does *not* create a single brand market because Ford requires more than one brand." *Id.* at 15a (emphasis supplied). The court then *held* that Virtual's proposed *interbrand* "Ford-required CAD/CAM market" was "flaw[ed]" and "unduly narrow" because it was "based solely on *one customer's* requirements." *Ibid.* (emphasis supplied) (citing cases).[3]

The court rejected Virtual's suggestion that because "all of Ford's design suppliers make up the customer market," "Ford is not the only customer." Pet. App. 16a. The court concluded on the evidence that "Ford is ultimately the single consumer of [PDGS]" because "Ford requires its suppliers to purchase the software updates for Ford's benefit" (*id.* at 16a); and indeed, Ford ultimately pays for the software updates and support because its suppliers "pass any price increase in software on to Ford" (*id.* at 21a).

[3] In its reply brief to the Sixth Circuit, in a section entitled "Ford-Required CAD/CAM Is Not A Legally Cognizable Market Because It Is Based On A Single Customer's Preference for One 'Brand' of CAD/CAM" (C.A. Rep. Br. 10), Prime urged that it "need not argue here that single brand markets are uniformly impermissible as a matter of law . . ." (*id.* at 11).

In addition, the court ruled that "market power [in the proposed 'Ford-required' market] is not created by [Ford's] year-to-year exclusive licensing of PDGS [to Prime]." Pet. App. 21a. Ford's "control of the product it is allegedly being forced to buy precludes Prime" from having the ability to "charge monopoly prices." *Id.* at 20a.[4]

The Sixth Circuit rejected Virtual's third theory — that the tie was illegal under the rule of reason — because "Virtual did not produce evidence of a significant amount of foreclosure due to the tie-in in the tied product market for computer hardware maintenance." Pet. App. 23a. This ruling also rested on two grounds. First, the court ruled that Virtual could not "limit the definition of the tied product to hardware maintenance of Prime 50 Series computers," because the evidence showed that "[h]ardware maintenance of Prime's computers is similar to servicing other minicomputers." *Id.* at 23a. Second, the court held that, even if the market were limited as Virtual proposed, the amount of foreclosure would still be insufficient to establish a violation: "Even assuming that Prime had market power over consumers of its own brand of software, Prime's tie foreclosed competition for hardware maintenance of at most the 400 50 Series systems [using] PDGS" out of a total 23,000 — or less than 2% — of such machines. *Id.* at 24a. *(citing Jefferson Parish*, 466 U.S. at 31).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals rests firmly on settled principles of antitrust law, principally on this Court's decision in *Jefferson Parish*. Because nothing in *Kodak* brings that decision into question, there is no occasion to prolong this litiga-

[4] The court noted "substantial evidence that large companies such as IBM, DEC, and Data General already possess the production capacity and facilities to develop software for Ford within one year" (Pet. App. 21a), and that these companies "and other competitors of Prime have contacted Ford about supplying PDGS software and updates for Ford and Ford's designers" (*id.* at 19a).

tion by a remand to the court of appeals. Indeed, petitioner really does not dispute the court's basic rulings: (1) that Prime's possession of 11% of the worldwide market for CAD/CAM support services (where the challenged tie affects less than 3% of that market) does not establish the requisite market power for a *per se* violation; (2) that a *single customer's* (Ford's) preference for a particular product does not establish a relevant market for tying purposes, and that even if it did, the customer's ultimate control over the product in this case prevents the seller from exercising market power; and (3) that market foreclosure of 2% of a proposed single brand market — and substantially less of the broader interbrand market established by the evidence — does not constitute a rule-of-reason violation. Instead, petitioner attempts to rewrite both its claim and the decision below to fit within the *Kodak* framework. That predictable contrivance provides no basis for burdening the lower courts with another round of costly litigation.

Petitioner's alternative suggestion that this Court should itself review the case (Pet. 13, 29) is similarly unpersuasive. This case raises no issue of general concern and involves no conflict in the lower courts. Rather, it simply presents an application of settled antitrust principles to a unique set of facts — Ford (not Prime) created and controls the relevant product, which Ford (not Prime) requires its suppliers to use.

A. THIS CASE DOES NOT MERIT A REMAND FOR RECONSIDERATION IN LIGHT OF *KODAK*

A fair reading of the opinions in *Kodak* and this case demonstrates that the two cases are different in all relevant respects. Petitioner's effort to make it appear otherwise relies on a misstatement of both its position below and the Sixth Circuit's decision.

1. *Kodak Has No Bearing on the Issues Decided Below.* *Kodak* involved a tying product market expressly based on a

single brand (unique parts for Kodak machines), and therefore one in which the defendant (Kodak) had virtually 100% control. 112 S.Ct. at 2077. The tied product market (service of Kodak machines) involved numerous unrelated and independent customers (machine owners and independent service providers). *Id.* at 2077. This Court held that, at least on summary judgment, requisite tying product market power could not be ruled out categorically simply because competition existed in yet a third market, the underlying interbrand market for copying machines. *Id.* at 2087-88.

The issues presented by Virtual's three claims here are different from, and their resolution unaffected by, this Court's holding and analysis in *Kodak:*

a. The General CAD/CAM Market. Virtual's first *per se* claim defined a tying product market that, unlike the tying product market in *Kodak*, was *not* based on a single manufacturer's brand. The asserted tying product market in this case was not software revisions and support for *Prime* CAD/CAM (contrast *Kodak*, where the market was parts for *Kodak* machines), but software support "for the CAD/CAM industry *in general.*" Pet. App. 12a (emphasis supplied). At Virtual's request, the jury was instructed accordingly. *Id.* at 12a. The court of appeals properly rejected this claim based on a routine application of well-established tying law principles concerning *inter*brand (not *single* brand) markets not at issue in *Kodak*. *Id.* at 12a-13a (citing cases). While Virtual claims to be arguing that this aspect of the Sixth Circuit's decision "conflicts with the *emphasis* in *Kodak* on forcing and market realities" (Pet. 22) (italics supplied), its real contention is that the "Sixth Circuit misread *Jefferson Parish*" (*id.* at 23). That argument, however, was fully presented and analyzed below (Pet. App. 8a-11a) and provides no reason for remand. (It is also wrong, as demonstrated below, *see* p. 13 *infra.)*

b. *The Ford-Required CAD/CAM Market.* Virtual's second *per se* tying claim is likewise unaffected by the "single brand market" analysis at issue in *Kodak*. Virtual maintains that the Sixth Circuit rejected the Ford-required CAD/CAM

market "as a matter of law because it encompassed only 'a single manufacturer's brand of software.' " Pet. 3 (quoting Pet. App. 14a). But that reading of the opinion is wrong. The opinion does *not* say that, "as a matter of law," a single brand can never constitute a proper market. To the contrary, the court rejected Virtual's claim only after "giving Virtual every inference"; that is, *accepting* Virtual's argument "that 'Ford-required CAD/CAM' is *not* a single brand market." Pet. App. 15a (emphasis supplied). Hence, Virtual's premise for the supposed conflict with *Kodak* — that the court of appeals based its holding on the legal inadequacy of a single brand market — runs contrary to the express statement of the court below.

In fact, the Sixth Circuit rejected Virtual's proposed "Ford-required CAD/CAM" market for reasons wholly unrelated to *Kodak*. First, the Sixth Circuit rejected the proposed market because it was "based solely on one *customer's* requirements." Pet. App. 15a (emphasis supplied). Second, the court held that, even if it accepted Virtual's proposed market, Prime had no power in that market because Ford *(not* Prime) controlled PDGS, which it licensed to Prime on a year-to-year basis. This "preclude[d] Prime from maintaining the market share necessary to charge monopoly prices." *Id.* at 20a (citations omitted).

Kodak did not involve either of these two grounds underlying the Sixth Circuit's holding. There, the tying product market was made up of *numerous independent* customers for Kodak parts, and *no* customer had control over Kodak's continuing ability to market those parts. No purpose would be served, therefore, by a remand to reconsider two essentially fact-based issues, unrelated to *Kodak*, that already have been thoroughly analyzed by the court below.

c. *The Rule-of-Reason Claim. Kodak* also has no bearing on Virtual's rule-of-reason claim that Prime unduly foreclosed access to a tied product "market" for servicing Prime 50 Series computers. The Sixth Circuit rejected this claim for two reasons. First, it ruled that the relevant market could not prop-

erly be limited to Prime 50 Series computers, but must include all minicomputer service because the clear evidence established that "[h]ardware maintenance of Prime's computers is similar to servicing other minicomputers." Pet. App. 23a.[5] Second, the court held that even if Prime 50 Series maintenance were a relevant market, the tie at issue affected less than 2% of it — at most 400 out of 23,000 machines — and thus did not unreasonably restrain trade. *Id.* at 24a.

Neither point was at issue in *Kodak*, which did not even involve a rule-of-reason claim. *Kodak* obviously did not purport to establish a legal rule that a single brand *always* defined the relevant market. 112 S.Ct. at 2090 ("... in *some* instances one brand of a product can constitute a separate market") (emphasis supplied). Nor did *Kodak* address the extent of tied product market foreclosure necessary to raise antitrust concerns. On the contrary, *Kodak* affirmatively supports precisely the kind of case-by-case analysis of economic evidence that the Sixth Circuit conducted in defining the relevant market and in judging a 2% foreclosure insubstantial. *See* 112 S.Ct. at 2082 (antitrust claims should be decided "on a case-by-case basis, focusing on the 'particular facts disclosed by the record' ")(citation omitted).

In sum, the Sixth Circuit's rejection of each of Virtual's three claims is fully consistent with *Kodak*. No rule of law incompatible with *Kodak* was laid down or relied on by the court of appeals; and because the dispositive issues in this case were simply not presented in or addressed by *Kodak*, the result here could not be affected by reconsideration in light of

[5] Virtual's founder testified: "A minicomputer is a mini computer is a mini computer. ... If you can work on one and understand one, you can work on the next one. Some are a little faster, some are a little slower, but basically they are all the same." C.A. App. 1310. Virtual's president agreed that there was nothing unique about hardware maintenance for the Prime 50 Series. *Id.* at 1363. Virtual's computer maintenance expert opined that "somebody who is capable of servicing other mini computers can generally service Prime computers." *Id.* at 1383.

Kodak. In these circumstances, there is no basis for remanding the case.

2. *The Petition Rests on a Mischaracterization of Virtual's Claims Below and of the Sixth Circuit's Opinion*. Virtual's petition barely mentions the three claims that it actually asserted below or the court of appeals' rulings on those particular claims. *See* Pet. 9, 11. Instead, Virtual would have it that it has always relied on a *Kodak*-like theory that PDGS software maintenance is an "aftermarket" product and that PDGS users were "locked in" to that product by virtue of their prior purchase of Prime 50 Series computers and PDGS. *E.g.*, Pet. 13, 17.[6] Virtual then asserts that certain general language in the Sixth Circuit's opinion is holding (rather than *dicta*, which it indisputably is), and argues that a remand is required because that language is now superseded by *Kodak*. But Virtual's current theory was never presented below, and the court's *dicta*, in the actual context of this case, do not support a remand to edit the opinion without altering the result.

a. *The Change in Virtual's Theory*. Taking leave of its position below, Virtual now advances a new tying argument, tailored to the analysis in *Kodak*. Thus the central submission in the petition is that the case should be remanded because the Sixth Circuit allegedly held that "Prime's lack of power in the market for *original* CAD/CAM software sales precluded as a matter of law the possibility that Prime possessed economic power in the distinct CAD/CAM software *support* aftermarket." Pet. 3 (emphasis in original); *see also id.* at 13 (the court of appeals incorrectly ruled that "Prime could not have power in the markets for *support* of either general or Ford-required CAD/CAM software unless it had power in the market for *original* purchases of CAD/CAM software") (emphasis in original). This supposedly decisive *Kodak*-like ruling, however, cannot be located anywhere in the Sixth Circuit's opinion — indeed, Virtual provides no citation —

[6] In fact, Virtual attempted to recast its case in *Kodak*-like "aftermarket" terms only after losing at the Sixth Circuit. *See* Virtual's application to this Court for stay of the Sixth Circuit's mandate (denied by Justice Stevens, April 23, 1992).

precisely because this theory of a distinct "aftermarket" was not pursued by Virtual below.

In fact, in the courts below, Virtual repeatedly *refused* to draw any distinction between an "original market" for software and an "aftermarket" for software support (to which hardware maintenance was tied). On the contrary, Virtual consistently treated what it now calls an "original market" (the software) and an "aftermarket" (software support) as one and the same for purposes of market definition and power. As Virtual put it in its brief to the Sixth Circuit, "the jury properly found that *general CAD/CAM* is a relevant market [and that] *Ford-required CAD/CAM* is a relevant market." C.A. Br. 24 (emphasis supplied).[7] Having itself failed to draw the very distinction that makes its *Kodak* analogy even superficially plausible, Virtual cannot now claim that the Sixth Circuit rejected any *Kodak*-like claim. *See* Pet. 16.

Nor does it appear that Virtual's failure to draw this distinction below was the product of oversight.[8] Rather, its treatment of software and support as economically indistinct reflects the fact that in this case, unlike *Kodak* — where parts and services typically were purchased *after* the original machine was purchased (112 S.Ct. at 2085-87) — 99% of PDGS customers originally purchased their software maintenance contracts (which include the hardware service

[7] Virtual similarly failed to make any distinction between software and software support in the district court. *See* Pet. App. 35a (summary judgment opinion) (citing Virtual's assertion that tying product markets are "*software programs* used for computer-aided design and computer-aided manufacturing applications" and "*software programs* required by Ford Motor Co. for CAD/CAM applications" (emphasis supplied). *See also* C.A. App. 1369-71, 1476-72 (trial testimony of Virtual's experts to same effect).

[8] Indeed, Prime's brief in the Sixth Circuit specifically took Virtual to task for its "constant confusion between the underlying software and [the support package] for that software." C.A. Br. 19 n.10. Yet, as noted in the text, Virtual's brief in response specifically chose to treat the software and the support package as indistinct.

requirement) *at the same time* they purchased the software. C.A. App. 1490-92.

b. *Virtual's Attempt to Change the Opinion.* Having rewritten its claim, Virtual proceeds to do the same with respect to the opinion below. Focusing specifically on the court's disposition of its second claim, Virtual asserts repeatedly that the court "held that a tying-product market definition limited to software support for 'Ford-required CAD/CAM' was too narrow as a matter of law because it encompassed only 'a single manufacturer's brand of software.' " Pet. 3 (quoting Pet. App. 14a.) But as an accurate portrayal of the decision shows, the court did not so hold. Rather, as previously noted, the court accepted *Virtual's* argument that its proposed market "is *not* a single brand market" *(id.* at 15a) (emphasis supplied) and then rejected the claim on two *other* grounds relating to Ford's unique role. *See id.* at 15a-22a; pp. 4-5 *supra.*

The court of appeals did note, in its preliminary discussion of this claim, that "[c]ourts . . . consistently reject market definitions limited to a single manufacturer's products." Pet. App. 14a. While *Kodak* makes clear that this observation cannot be read to lay down a categorical rule of law, there is certainly no need for a remand solely to clarify that language. This is particularly true because the decision below did not rest on the legal principle suggested by the disputed language *(see* p. 4 *supra.*), and therefore a remand can have no effect on the outcome.

B. NEITHER THE PETITION NOR THE SIXTH CIRCUIT'S RULINGS PROVIDE ANY JUSTIFICATION FOR PLENARY REVIEW

Petitioner passingly suggests that, if a remand is unwarranted, this Court should entertain the case on the merits. *See* Pet. 13, 29. The sole reason provided for this suggestion is that the "Court should . . . clarify the application of *Kodak* in the context of a fully developed trial record." *Id.* at 13. That

Delphic assertion, however, provides no basis for granting the petition. Virtual's failure to adduce any substantive reason to support its position is not surprising. The Sixth Circuit's actual rulings raise no important or recurring issues and no conflicts. Rather, each of its three rulings involves the application of settled antitrust principles to a rare, if not unique, set of factual circumstances.

1. *The General CAD/CAM Market.* The court of appeals' rejection of this claim rests on a routine application of *Jefferson Parish*, concluding that an "at most . . . 11% share of this market" is "insufficient to confer market power." Pet. App. 12a. The decisions of this Court and those of other circuits, far from conflicting with this ruling, strongly confirm it. *See id.* at 12a (citing cases).

Virtual attempts to suggest otherwise, arguing that the Sixth Circuit "misread *Jefferson Parish*" (Pet. 23), which Virtual says was based on the fact "that consumers were not really 'forced' at all into accepting a product they otherwise would have purchased elsewhere." *Id.* at 24. But in the only sense that the term is relevant here, the consumers in *Jefferson Parish* were every bit as "forced" to take the specified anesthesiological services (tied product) if they wanted to use the hospital (tying product) as the consumers in this case are "forced" to use Prime hardware maintenance (tied product) if they want PDGS support (tying product). In both instances, individual consumers might well prefer to split the package, but that fact makes no antitrust difference unless the consumers are forced to buy the package in the first place "*as a result* of the [seller's tying product] *market power.*" 466 U.S. at 25 (emphasis supplied). *See also United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 620 n.13 (1977) (rejecting the notion that "the inclusion of tie-in clauses in contracts with any appreciable number of buyers establishes market power") (internal quotation marks omitted). That is all that the court of appeals held in this case when it found Prime's insubstantial market share an insufficient basis to

establish requisite tying product market power. *See* Pet. App. 9a-10a.

2. *The Ford-Required CAD/CAM Market.* The court of appeals rejected this claim for two reasons: (1) that the tying product market could not properly be defined solely by reference to the demand of Ford, a single customer; and (2) that even within that improperly defined market, Prime could not exercise the market power required for a *per se* tying violation because Ford (the customer) controlled PDGS (the product). Neither of these holdings — either of which is independently sufficient to support the judgment on this claim — merits plenary review and both were correctly decided.

To begin with, the Sixth Circuit's rejection of a single-purchaser market is not in conflict with any decision of this Court or of another court of appeals, and nowhere in its petition does Virtual contend otherwise. This case indisputably does not raise any antitrust issues of recurring importance, because such an artificially defined market does not give rise to the types of concerns that normally trigger antitrust scrutiny.[9] In contrast to a case like *Kodak*, which involved a single *brand* aftermarket that potentially included many "unsophisticated" customers (112 S.Ct. at 2086-87), it is hard to conceive that a single *customer* whose choice affects others could be unsophisticated and subject to exploitation. Surely this

[9] Virtual does not really contest the court of appeals' legal ruling that a market defined by single customer's requirement is "unduly narrow" (Pet. App. 15a), but instead disputes the court's conclusion that the market here was defined by a single customer. For example, Virtual argues that "Ford has little incentive to battle Prime on behalf of the suppliers [whom Ford requires to use PDGS]" until "price increases [to those suppliers] become so huge that the pass-through to Ford . . . became noticeable." Pet. 19. But the evidence showed that the suppliers' costs *were* passed through to Ford (C.A. App. 1435; Tr. 812), and that Ford was capable of compelling Prime to change its PDGS pricing, and had done so (C.A. App. 1494-95). Thus, the court correctly found that Virtual's claim rests on "the suspect assumption that Ford is willing to pay greatly increased costs to its design suppliers, who will pass any price increase in software on to Ford." Pet. App. 21a. This fact-based conclusion obviously does not merit review.

case, where *Ford* is that single customer, presents no occasion for studying such a possibility. It is thus hardly surprising that Virtual is unable to point to *any* authority supporting a tying product market defined by the requirement of a single customer.[10]

The Sixth Circuit's alternative ground for rejecting Virtual's "Ford-required" claim — that Prime lacked market power even within the single-customer market defined by Virtual — likewise does not warrant review. The issue is plainly fact-specific, because it is based on the unusual circumstance that the very firm that is the ultimate customer here (Ford) *(see* Pet. App. 16a) also has control of the tying product through its ability to terminate Prime's authority to sell that product (*see id.* at 21a).[11] No other case remotely calls into doubt the Sixth Circuit's ruling on those facts.

3. *The Rule-of-Reason Claim.* The Sixth Circuit's two alternative rulings on the rule-of-reason issue — that a tied product market limited to Prime 50 Series maintenance was too narrow in light of trial evidence and that 2% foreclosure in that market was insubstantial in any event — likewise do not merit review. The first rests on a traditional fact-based assessment of product substitutability: "[h]ardware main-

[10] The best that Virtual can muster is a "*cf.*" cite to *United States* v. *Grinnell Corp.*, 384 U.S. 563, 567, 573-75 (1966), a monopolization (not tying) case which involved *numerous* customers (insured buyers of alarm services) and *numerous* insurance companies that uniformly required their insureds to use particular alarm services in order to obtain favorable insurance rates. *See* Pet. 19. Virtual's attempted analogy fails because in this case only a *single* company (Ford) expressed a preference for PDGS. Nothing in *Grinnell* suggests that if only a *single* insurer had specified a particular alarm service provider, that preference would have defined an antitrust market.

[11] Virtual now urges that "Ford cannot reasonably switch from Prime and PDGS", citing testimony about the allegedly prohibitive costs to Ford of replacing its *own* Prime hardware and replacing PDGS as its CAD/CAM software. Pet. 19. However, this has nothing whatever to do with Ford's ability to replace Prime as the *distributor* of PDGS and its updates to Ford's suppliers. Virtual's assertion that "Ford could not economically license another vendor to distribute PDGS updates" *(id.* at 6) not only is irrational, but is not supported by the evidence Virtual cites.

tenance of Prime computers is similar to servicing other minicomputers." Pet. App. 23a. The second involves a routine finding that a 2% market foreclosure is insufficient to establish a rule-of-reason violation. *See, e.g., Jefferson Parish*, 466 U.S. at 45-47 (O'Connor, J., concurring) (foreclosure of "small fraction" of market insufficient to support rule of reason claim).

Indeed, Virtual does not even mention, let alone dispute, the court of appeals' narrower (but completely adequate) ruling that a 2% foreclosure in the market *as defined by Virtual* (Prime 50 Series computers alone) does not give rise to an antitrust violation. Instead, in a transparent attempt to avoid this clearly correct ruling, Virtual casually asserts that "Prime's conduct was proven actually to have restrained competition in a *three-state market segment.*" Pet. 21 (emphasis supplied). But the geographic market in this case — stipulated to by Virtual — is "the entire world" (Pet. App. 8a), not three states, as Virtual's petition would now have it. Given the market that Virtual agreed to, the Sixth Circuit's decision was unmistakably correct.

There is, in sum, no plausible basis for Virtual's alternative position that this Court should hear this case on the merits.[12]

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[12] Virtual also raises the question whether the rule of *Griffin* v. *United States*, 112 S.Ct. 466 (1991), a criminal case, should apply in civil cases, so that a general verdict based on multiple legally sound theories should stand even if the appellate court holds that one of the legally sound theories is not supported by sufficient evidence. Pet. 14, 25-29. This question is not properly presented in this case, because the Sixth Circuit found *all* of the theories underlying the verdict defective.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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